Office ... Court, U.S.
FILED
...
ALEXANDER L. STEVAS,
CLERK

No. 83-1251

In The
Supreme Court of the United States
October Term, 1983

NATIONAL LIBERTY LIFE INSURANCE COMPANY

Appellant,

v.

STATE BOARD OF EQUALIZATION,

Appellee.

On Appeal from the Supreme Court of the State of California

MOTION TO DISMISS OR AFFIRM

JOHN K. VAN DE KAMP
Attorney General of the State of California
TIMOTHY G. LADDISH
Deputy Attorney General
(Counsel of Record)
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-0792
Attorneys for Appellee

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTION PRESENTED

Is there a substantial federal due process question regarding California's jurisdiction to tax the California insurance business of a Pennsylvania insurer which conducted its California solicitations by mail and advertising and which had independent contractors present in California as its representatives for claims verification, investigation and litigation?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

No. 83-1251

In The

Supreme Court of the United States

October Term, 1983

NATIONAL LIBERTY LIFE INSURANCE COMPANY

Appellant,

v.

STATE BOARD OF EQUALIZATION,

Appellee.

On Appeal from the Supreme Court of the State of California

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, hereby moves this Court to dismiss this appeal or to affirm the decision of the California Supreme Court on the ground that this case does not present a substantial federal question.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

The California Supreme Court has held that the State of California had jurisdiction to apply its insurance tax upon appellant National Liberty Life Insurance Company for the privilege of conducting its California insurance business.[1] The case was tried on a stipulation of facts (cited herein as "Stip."). The facts are set forth in the opinion of the California Supreme Court and are discussed in some detail in the argument of this motion; in summary, appellant National Liberty was an insurance company, organized and with its home office outside of California, which solicited California life, accident and health insurance business through millions of direct mail solicitations to Californians and considerable magazine, newspaper and radio advertising in California. Stip. ¶¶ 66, 25-29, 61, 63-65. Although appellant had no representatives physically present in California to assist in its solicitation of business, National Liberty had numerous independent contractor representatives (including investigators, doctors, and lawyers) who were physically present in California and who represented National Liberty regarding claims verification, investigation, and litigation (including settlement); during the years at issue approximately 175 investigators conducted approximately 153 claims investigations in California for National Liberty. Stip. ¶¶ 54-58; 67.

---

1 The California decision is reported as *Illinois Com. Men's Assn. v. State Bd. of Equalization* (1983) 34 Cal.3d 839, 671 P.2d 349, 196 Cal.Rptr. 198; citations to that decision herein will be to the official reports and to appendix A of appellant's jurisdictional statement (J.S. App. A). Illinois Commercial Men's Association has filed a separate jurisdictional statement with this Court (No. 83-1264).

Appellant challenges California's jurisdiction to tax on due process grounds. National Liberty's arguments are concentrated on three cases: *National Bellas Hess v. Dept. of Revenue* (1967) 386 U.S. 753; *Scripto v. Carson* (1960) 362 U.S. 207; and *Miller Bros. Co. v. Maryland* (1954) 347 U.S. 340.

The three cases primarily discussed by appellant can be succinctly covered. While the *National Bellas Hess* result rests on the proposition that contacts *only* through the mail or common carrier cannot by themselves provide jurisdictional nexus to tax a general business, here the record establishes that National Liberty also had representatives physically present in California, engaging in activities crucial to National Liberty's insurance business. Contrary to appellant's suggestion, the *Scripto* decision clearly stands for the proposition that, for due process jurisdictional purposes, the instate activities of true independent contractors should be treated as activities of the taxpayer; also, there is no indication in *Scripto* that said proposition would be limited only to acts of solicitation. *Miller Bros. Co. v. Maryland* is distinguishable here, as it was distinguished in *Scripto* and *National Geographic v. Cal. Equalization Bd.* (1977) 430 U.S. 551, 561-62, on the basis that the out-of-state seller in *Miller Bros.* had not exploited the taxing state's local market: in *Miller Bros.* all of the taxing state's purchasers were in the seller's home state when they made their purchases.

ARGUMENT

I. The California Supreme Court has properly distinguished National Bellas Hess based on National Liberty's claims investigations in California.

The California Supreme Court, applying the due process jurisdictional standard stated by this Court in *National Bellas Hess v. Department of Revenue* (1967) 386 U.S. 753, 756, has held that California has jurisdiction to tax National Liberty because there is "' "some definite link, some minimum connection" ' " between California and National Liberty and because California has given National Liberty protection for which it can ask return. 34 Cal.3d at 846, 850; J.S. App. A, A-6, A-13.

On page 10 of the jurisdictional statement, appellant National Liberty follows an accurate quotation from this Court's *National Bellas Hess* decision with a quite inaccurate representation of what that decision "stands for". Unlike the current case, *National Bellas Hess* involved both the due process clause and the commerce clause, for it involved the catalog sale of general merchandise rather than the business of insurance.[2] This Court's holding in *National Bellas Hess* was made on the basis that "[*a*]*ll* of the contacts which National does have with the State

2 Insurance tax cases (such as the one at bar) do not involve the commerce clause: the McCarran-Ferguson Act (15 U.S.C.A. §§ 1011-1015) has removed all commerce clause restrictions from the state regulation and taxation of insurance business. *Western & Southern L.I. Co. v. Bd. of Equalization* (1981) 451 U.S. 648, 653.

are via the United States mail or common carrier." 386 U.S. at 754 (emphasis added).[3]

The California Supreme Court has distinguished *National Bellas Hess* from the current case on the clear basis that National Liberty had many representatives actually in California acting on its behalf in numerous claims investigations during the years at issue. 34 Cal.3d at 849-52, J.S. App. A, A-12 - A-15. (The status of these representatives as independent contractors is discussed below.) The California Supreme Court recognized these claims activities as being a "function crucial to the administration of the insurance policies covering California residents" and held as follows:

> "We hold, therefore, that the character and extent of plaintiffs' activities in this state were sufficient to form the 'definite link' and 'minimum connection' required to justify imposition of the tax, and that plaintiffs received the benefit of this state's law

---

3 In note 14 on page 18 of its jurisdictional statement, National Liberty attempts to use factual assumptions made by the *dissent* in *National Bellas Hess* to soften the clear and restricted basis of the majority opinion. See also J.S. 14 n. 11. The *National Bellas Hess* record contained no evidence of *any* contacts with the taxing state other than via the United States mail or common carrier; the entire point of that litigation was to determine the validity of an Illinois statute which framed tax collection jurisdiction solely upon soliciting orders " 'by means of catalogues or other advertising . . . .' " See *id.* at 755. The majority decision was made on the basis that National Bellas Hess' "only connection with customers in the State is by common carrier or the United States mail." *Id.* at 758. As far as follow-up activities are concerned, the *National Bellas Hess* majority opinion recognizes that under the facts presented to this Court, National Bellas Hess did not have in Illinois any " ' type of representative . . . to service merchandise it sells . . . .' " *Id.* at 754.

through the protections afforded their agents in California." *Id.* at 850; J.S. App. A, A-13 (footnote omitted.)[4]

It is respectfully submitted that the California Supreme Court has properly distinguished this Court's *National Bellas Hess* decision in reaching this holding.

Appellant National Liberty mistakenly relies upon *National Bellas Hess* in claiming that a nondomiciliary corporation which has no property or office in the taxing state *must* employ *solicitors* to generate business within the state in order to be subject to that state's taxing jurisdiction. J.S. 10. No such "in person" solicitation requirement is stated or implied in the *National Bellas Hess* majority opinion, and appellant later recognizes (J.S. 18 n. 14) that "counsel is unaware of any explicit statement by this Court to the effect that follow-up activities within a state are less important than solicitation in conferring state tax jurisdiction over a seller . . . ."

The California Supreme Court has considerable support for its determination that National Liberty's representatives' California claims investigation activities

---

4 National Liberty had additional connections which support California taxing jurisdiction. Since the California Supreme Court decided that the claims representatives in California provided sufficient nexus, that court did not find it necessary to weigh the activities conducted by doctors and lawyers paid by National Liberty to act on its behalf in California. Stip. ¶¶ 57, 67. The California Supreme Court noted that under its determination it did not find it necessary to determine also whether health and safety benefits which California provided to National Liberty's insureds also benefited National Liberty. *Id.* n. 6. See *Armed Forces Co-Op., etc. v. Dept. of Ins.* (1980) Wyo., 622 P.2d 1318, 1347, *appeal dismissed* (1982) 454 U.S. 1130.

were "an important and integral part of the business of insurance . . . critical to the 'realization and continuance' of the business conducted by plaintiffs in this state." 34 Cal.3d at 854, J.S. App. A, A-20. It is the privilege of carrying on the insurance business that is being taxed here, not merely the privilege of carrying on insurance solicitations or sales. See *Carpenter v. People's Mut. Life Ins. Co.* (1937) 10 Cal.2d 299, 302, 74 P.2d 508, 510.[5] In upholding Wyoming's taxation of mail-order insurers, the Wyoming Supreme Court recently has recognized that the claims procedure is "a hugely important aspect of any insurance business." *Armed Forces Co-Op., etc. v. Dept. of Ins.* (1980) Wyo., 622 P.2d 1318, 1345, *appeal dismissed* (1982) 454 U.S. 1130. The constitutional importance of whether any claims investigation is carried out in the taxing state is emphasized by the specific mention of the *absence* of such activities in cases where this United State Supreme Court has *denied* a state's jurisdiction to tax insurers. *See, e.g., Connecticut General Life Ins. Co. v. Johnson* (1938) 303 U.S. 77, 82; *State Bd. of Ins. v. Todd Shipyards* (1962) 370 U.S. 451, 454-55.

---

5 Appellant several times (J.S. 7, 19, 20) refers to the California tax as a "gross receipts" tax; therefore it should be emphasized that the tax is a *privilege* tax which is only measured by gross premiums from California insureds. "It is not a gross receipts tax" of the sort that would include in its measure all other types of income an insurer might have. *Equitable Life etc. Soc. v. Johnson* (1942) 53 Cal.App.2d 49, 58, 127 P.2d 95, 99. Appellant is not now challenging the California Supreme Court's holding that, once jurisdiction is established, it was proper to include all premiums received from California insureds in the measure of the tax. 34 Cal.3d at 852-55; J.S. App. A, A-16-A-20.

Appellant National Liberty's attempt to brand its California claims investigations activities as insignificant must fail. Contrary to appellant's arguments (J.S. 11), the California Supreme Court has not surreptitiously applied a "slightest presence" test in correctly holding that the integral and crucial claims investigations of National Liberty's California representatives serve to distinguish this case from *National Bellas Hess.* 34 Cal.3d at 849-50; J.S. App. A, A-11 - A-13.

II. Scripto v. Carson authorizes attributing in-state activities of independent contractors to sellers from outside the taxing state.

Appellant National Liberty attempts to rewrite *Scripto v. Carson* (1960) 362 U.S. 207 so that its holding would only apply when an out-of-state seller had attempted to disguise de facto employees by giving them a sham designation as "independent contractors". See J.S. 12-14. To the contrary, the following excerpts from the *Scripto* opinion indicate that this Court accepted the representatives in that case as true independent contractors:

> "[T]he 'salesmen' are not regular employees of appellant devoting full time to its service, but we conclude that such a fine distinction is without constitutional significance. . . . [W]e cannot see, from a constitutional standpoint, 'that it was important that the agent worked for several principals.' . . . The test is simply the nature and extent of the activities of the appellant in Florida." *Id.* at 211-12.

There is no basis in *Scripto* or in logic that would limit the *Scripto* attribution rule only to independent contractors who solicit sales; as noted by the California Supreme Court, under *Scripto* any California activities of

National Liberty's independent contractors should be weighed as if they had been conducted by employees. See 34 Cal.3d at 849, J.S. App. A, A-11 - A-12. (See discussion above at pp. 6-8 regarding the significance here of the type of California contracts made by National Liberty's independent contractors.)

III. Miller Bros. v. Maryland, which involved only totally out-of-state purchases, is clearly distinguishable.

Appellant National Liberty refers to the California Supreme Court's distinguishing of *Miller Bros. Co. v. Maryland* (1954) 347 U.S. 340 as "[p]articularly egregious" (J.S. 15); yet it appears that the California Supreme Court has distinguished *Miller Bros.* on the same basis utilized by this Court in *Scripto v. Carson, supra,* and *National Geographic v. Cal. Equalization Bd.* (1977) 430 U.S. 551. As pointed out by the California Supreme Court, *Miller Bros.* involved "purchases made in foreign state". 34 Cal.3d at 851; J.S. App. A, A-15. In *Miller Bros.* this Court rejected Maryland's jurisdiction to tax, noting that "[t]he liability arises only because of a Delaware sale and is measured by its proceeds." 347 U.S. at 344. As pointed out by this Court in *Miller Bros.*, in that case there was "no invasion or exploitation of the consumer market in Maryland." *Id.* at 347. In *Scripto,* the *Miller Bros.* decision was distinguished in part on the basis that in *Miller Bros.* the purchases were made by Maryland residents when personally present in Delaware: "there was no 'exploitation of the consumer market'; no regular, systematic displaying of its products by catalogs, samples or the like." 362 U.S. at 212. In *National Geographic,* a

mail-order sales case, this Court distinguished *Miller Bros.* on the same ground, citing *Scripto.* 430 U.S. at 559.

In the case at bar there can be no doubt that National Liberty exploited the local insurance market in California. During the three years in issue in this case National Liberty sent 3,460,882 solicitations to prospective California insureds. Stip. ¶ 66.[6] In terms of exploiting the California market, those solicitations occurred in California: "[R]ealistically viewed the insurer through the instrumentality of the mail is for all practical purposes soliciting insurance here as manifestly as if it were to carry on such solicitation through representatives physically present within this state." *People v. United National Life Ins. Co.* (1967) 66 Cal.2d 577, 593, 58 Cal.Rptr. 599, 609, 427 P.2d 199, 209, *appeal dismissed* 389 U.S. 330 (in which National Liberty was one of several mail-order insurers held to be subject to California insurance regulation).[7]

---

6 The highest California population figure for these years was 18,464,000 in 1965. 1981 California Statistical Abstract, p. 13. Thus during this three-year period it might be expected that one out of every five or six Californians was directly solicited by mail by National Liberty. In 1965 National Liberty insured 20,323 California citizens (Stip. ¶ 59); that figure is greater than the 1965 population of one out of every four California *counties*. 1966 California Statistical Abstract, p. 12. Furthermore, an undetermined number of the National Liberty mail solicitations included an actual policy which the California resident could accept in California by mailing a validation certificate back to National Liberty. Stip. ¶ 33, Exh. K.

7 In *National Bellas Hess* this Court held that conducting a general business solely by mail or common carrier could not by itself give taxing jurisdiction. There was no holding that mail-order solicitation had no constitutional significance at all. Moreover, in an insurance tax case such as this, in which only the due process clause but not the

(Continued on following page)

In addition to its broad exploitation of the California market through the mails and advertising in national magazines, National Liberty also conducted some California radio advertising and advertised in several dozen California newspapers. Stip. ¶¶ 28-29, 61, 63-65. In fact, magazine, radio and newspaper advertising yielded approximately 39% of the applications which came from California in 1965. Stip. ¶ 61.

It is respectfully submitted that under the above facts the California Supreme Court was fully justified in distinguishing the *Miller Bros.* decision on the basis that *Miller* did not involve true invasion or exploitation of the taxing state's market.

IV. The result below does not automatically apply to mail-order sellers other than insurers.

Although the California Supreme Court has held that the same due process *standards* apply to insurers as apply to other types of businesses (34 Cal. 3d at 846-47; J.S. App. A, A-6 - A-9), that does not constitute a holding that any in-state follow-up activity after any mail-order sale of merchandise will give constitutional nexus to tax. In this case the California Supreme Court applied the standard due process tests and based its jurisdictional holding on its recognition that claims investigation activities are an

---

(Continued from previous page)

commerce clause is applicable (see note 2 above), weight should be given to all activities carried on within the state even if some of those activities are accomplished by means of instrumentalities of interstate commerce. In this respect it is interesting that appellant National Liberty relies upon the interstate deliveries in *Miller Bros.* as substantial ancillary activities. J.S. 15, 16.

integral and crucial part of the *insurance* business. 34 Cal.3d at 849, 850, 854; J.S. App. A, A-12, A-13, A-20. In other businesses where the sale of goods is the primary object, the importance of any in-state follow-up activities will have to be independently weighed. Furthermore, even if the identical due process standards apply to insurers and sellers of goods, taxation of activities involving the sale of goods will also have to meet the tests of the commerce clause: the facts of other cases may result in a tax being valid under the due process clause and yet the tax may fall before the commerce clause. See Hartman, "State Taxation of Interstate Commerce: A Survey and an Appraisal", 46 Va. L. Rev. 1051, 1061-62 (1960); also see notes 2 and 7 above.

V. This Court recently has rejected another appeal which presented the same issue.

The California Supreme Court discusses three decisions from other jurisdictions where "the power of a state to tax mail order insurers was upheld even though the activities of the insurers in the taxing state were similar to or less extensive than those of plaintiffs." 34 Cal.3d at 850-51; J.S. App. A, A-12 - A-15. All three of these decisions (one involving National Liberty) were presented to this Court, and this Court declined to review all three. *Ministers Life & Casualty Union v. Haase* (1966) 30 Wis.2d 339, 141 N.W.2d 287, *appeal dismissed* 385 U.S. 205; *National Liberty Life Ins. Co. v. State of Wisconsin* (1974) 62 Wis.2d 347, 215 N.W.2d 26, *cert. denied and appeal dismissed* (1975) 421 U.S. 940, 946; *Armed Forces Co-Op., etc. v. Dept. of Insurance* (1980) Wyo., 622 P.2d 1318, *appeal dismissed* (1982) 454 U.S. 1130. Thus this Court's

latest exposure to this issue was in 1982 in the *Armed Forces Co-Op.* case, wherein the Wyoming Supreme Court had held that Wyoming had due process jurisdiction to tax and regulate a Kansas insurer who had considerably less overall contacts with Wyoming than National Liberty has with California in the case at bar. It is respectfully submitted that no constitutionally significant differences are presented in the current case which would give cause for this Court's now giving plenary consideration to the issue.

CONCLUSION

For the reasons given above, it is respectfully submitted that this Court should dismiss the appeal or, in the alternative, affirm the decision of the California Supreme Court.

DATED: March 16, 1984.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the
State of California

TIMOTHY G. LADDISH
Deputy Attorney General

Attorneys for Appellee